Supreme Court, U.S.
FILED
JAN 23 1995
OFFICE OF THE CLERK

No. 94-1000

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VIRGINIA GASOLINE MARKETERS &
AUTOMOTIVE REPAIR ASSOCIATION, INC.,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Did the court of appeals err in holding that a Virginia law depriving certain petroleum franchisors of a right to termination or nonrenewal granted them under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801 *et seq.*, is preempted by the express preemption provision of the PMPA, which prohibits state laws or regulations "with respect to termination" that are not "the same as" the law with respect to termination under the PMPA?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, respondent Mobil Oil Corporation states that it is a wholly owned subsidiary of Mobil Corporation. Mobil Oil Corporation has the following nonwholly owned subsidiaries:

Atas Anadolu Tasfiyehanesi A.S.
Canner's Steam Company, Inc.
Collins Pipeline Company
Felix Oil Company
Mobil Oil De Mexico, S.A. De C.V.
Mobil Oil Del Peru (Compania Comercial) S.A.
Mobil Oil Guinee
Mobil Oil Mauritanie
Mobil Oil Nigeria Public Limited Company
Mobil Tunisie
Near East Development Corporation
T&M Terminal Company

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The petition filed by the Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA"), which is the sole petitioner following the Virginia Attorney General's decision not to seek certiorari, omits several important facts. At issue in this case is the validity of certain provisions of the so-called "S.B. 235" amendments to the Virginia Petroleum Products Franchise Act, Va. Code § 59.1-21 *et seq.* Respondent Mobil Oil Corporation ("Mobil") filed a declaratory judgment action against the Attorney General of Virginia before the July 1, 1990 effective date of the state statute. Mobil contended, *inter alia*, that certain provisions of S.B. 235 were invalid under the express preemption section of the federal Petroleum Marketing Practices Act, 15 U.S.C.

§ 2801 *et seq.* ("PMPA").[1] VGMARA, the trade association and lobbying representative for gasoline dealer interests in Virginia, intervened to defend the statute and the advantages it bestowed on VGMARA members.

The provisions of S.B. 235 that Mobil contended conflicted with the PMPA were the following regulations of petroleum franchise agreements in Virginia:

1. the "No Quotas Provision," which prohibited refiners from requiring any dealer to meet motor

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[1] The PMPA was recently amended by the Petroleum Marketing Practices Act Amendments of 1994, Pub. L. No. 103-371, 108 Stat. 3484. Petitioner has failed to meet its obligation to inform the Court of the Amendments, as have *amici* WMDP Service Station and Automotive Repair Association, *et al.* ("*Amici*"). *See, e.g., Fusai v. Steinberg*, 419 U.S. 379, 387 n.12, 390 (1975) (counsel have duty promptly to disclose any change in statute under review). Indeed, *Amici* premise their argument for review on lower court disagreement over a part of the statute (not at issue here) that was explicitly altered by the Amendments. *See infra* at 14.

It is Mobil's position that the Amendments' changes to the PMPA, which are not at issue here, provide no independent ground for denial of certiorari because they do not alter PMPA preemption analysis as applied in this case. *See* S. Rep. No. 103-387, 103d Cong., 2d Sess. 2, 5 ("The Committee wishes to stress that, except for the provisions contained in section 5 regarding goodwill and transfer of the franchise upon the death of the franchisee, the bill has no effect on federal preemption as provided in the 1978 Act."); H.R. Rep. No. 737, 103d Cong., 2d Sess. 4-5, reprinted in 1994 U.S.C.C.A.N. 2779, 2782 (under amendments States still may not "in any way regulate the grounds for termination or nonrenewal of a franchise . . . unless the State statute is exactly the same as the provisions of PMPA Title I").

The Court should be aware, however, that several dealer associations have publicly taken the position that the Amendments alter preemption analysis, including the Fourth Circuit's result here. The silence of VGMARA and *Amici* appears to indicate agreement with Mobil's view that the Amendments have not altered PMPA preemption analysis. If this is not the case, VGMARA and *Amici* should candidly disclose that they are asking the Court needlessly to commit its resources to reviewing a statutory scheme they believe has been changed by subsequent legislation.

fuel "purchase or sales quotas," Va. Code § 59.1-21.16:2(C);

2. the "No Minimum Hours Provision," which prohibited refiners from requiring any dealer "to keep his retail outlet open for business for more than sixteen consecutive hours per day, nor more than six days per week," with the exception of "retail outlets which participate in the travel services signing program of the Virginia Department of Taxation," *id.* § 59.1-21.11:1;

3. the "Rent Control Provision," which required refiners to charge rents "based on commercially fair and reasonable standards, uniformly applied to all similarly situated dealers of the same refiner in the same geographic area," *id.* § 59.1-21.11:6;

4. the "Minimum Renewal Provision," which required that all franchise renewals "shall not be for less than three years," *id.*; and

5. the "No Maximum Stations Provision," which prohibited refiners from limiting the number of stations the refiner may decide to lease to a single dealer, *Id.* § 59.1-21.11:4.

S.B. 235 also created a private civil remedy for VPPFA violations, including a $2500 liquidated damages penalty plus actual damages and attorneys' fees. *Id.* § 59.1-21.2. In addition, the Attorney General was given statutory authority to investigate and bring actions for violations of the statute. *Id.* § 59.1-68.2.

In the courts below, Mobil has consistently relied upon the express preemption provision of the PMPA, which provides that

> no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any penalty or remedy applicable to any violation thereof) *with respect to* termination . . . of any franchise or to the nonrenewal . . . of any such franchise relationship unless

> the provision of such law or regulation *is the same as* the applicable provision of this title.

15 U.S.C. § 2806(a) (emphasis added). The foregoing preemption provision reflected congressional intent to eliminate the "uneven patchwork of rules governing franchise relationships which differ from State to State." S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S.C.C.A.N. 873, 877. In place of this "uneven patchwork," Congress substituted

> *a single, uniform set of rules* governing the *grounds* for termination and nonrenewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non-renewal of a franchise relationship.

Id. (emphasis added).

The PMPA contains a number of provisions that "apply to" termination and nonrenewal within the meaning of 15 U.S.C. § 2806(a). These provisions allow a franchisor such as Mobil to terminate (or fail to renew) a franchise for any of the following reasons:

- "failure by the franchisee to comply with any provision of the franchise, which provision is both *reasonable* and of *material significance* to the franchise relationship," 15 U.S.C. § 2802(b)(2)(A) (emphasis added);
- "failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise," 15 U.S.C. § 2802(b)(2)(B); and
- "occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable." 15 U.S.C. § 2802(b)(2)(C). Such events include "loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease." 15 U.S.C. § 2802(c)(4).

The PMPA also allows nonrenewal for certain additional specified reasons, including:

> *failure* of the franchisor and the franchisee *to agree to changes* or additions to the provisions of the franchise, if—
>
> (i) such changes or additions are *the result of determinations made by the franchisor in good faith and in the normal course of business*; and
>
> (ii) such failure is *not* the result of the franchisor's insistence upon such changes or additions *for the purpose of preventing the renewal of the franchise relationship.*

15 U.S.C. § 2802(b)(3)(A) (emphasis added).

It is uncontested that each of the provisions of S.B. 235 at issue forbade terminations and nonrenewals that the foregoing provisions of the PMPA permit.[2] VGMARA has also conceded that the provisions of S.B. 235 at issue gave franchisees a state law cause of action to contest franchise terminations (or nonrenewals) that otherwise would be permitted by the PMPA. In fact, the Fourth Circuit previously characterized S.B. 235 as affording dealers a "stiff civil remedy" [3] for terminations for failure to meet quotas, observe hours of operation, and comply with other franchise provisions that are "reasonable and of material significance" within the meaning of the PMPA. Accordingly, Mobil contended below that S.B. 235 was

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[2] *See, e.g., Mobil Oil Corp. v. Karbowski*, 667 F. Supp. 927, 935-36 (D. Conn. 1987), *aff'd*, 879 F.2d 1052 (2d Cir. 1989) (fuel sales quotas); *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 983-84 (2d Cir. 1989) (hours of operation); *Palmieri v. Mobil Oil Corp.*, 529 F. Supp. 506, 511 (D. Conn.), *aff'd*, 682 F.2d 295 (2d Cir. 1982) (failure to pay or to agree upon rent); *Sachi v. Mobil Oil Corp.*, 1980-1 Trade Cas. (CCH) ¶ 63,044 (E.D.N.Y. 1979) (expiration of lease term); *Thompson v. Amoco Oil Co.*, 903 F.2d 1118 (7th Cir. 1990) (failure to devote personal attention to franchised premises).

[3] *See Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991) (*"Mobil I"*).

invalid because it imposed a "law or regulation (including any penalty or remedy applicable to any violation thereof) *with respect to* termination" that is not "the same as" the applicable provision of the PMPA. 15 U.S.C. § 2806(a) (emphasis added). This conflict between S.B. 235 and the express preemption provision of the PMPA—and not the "implied preemption" argument attributed to Mobil by VGMARA, Pet. 8-9—is the rationale advanced by Mobil here, in the Fourth Circuit, and before the district court.

The district court essentially agreed with this analysis of S.B. 235, and held that PMPA § 2806 preempted all but the "rent control" provision of S.B. 235. The district court took the view that the rent control provision merely regulated the "substance" of the franchise relationship, and did not implicate termination or renewal. The district court also held as an independent, alternative ground for its decision that S.B. 235 was a "Special Law," invalid under the Virginia Constitution. Virginia's Special Laws provision aims to prevent "economic favoritism" by requiring that the class regulated by a law be reasonable to the furtherance of its purposes, and that the law not arbitrarily exclude classes that would naturally come within its scope. Applying the Virginia constitutional standard, the district court observed:

> There is no 'natural and reasonable' distinction between a Mobil station that leases to a franchisor, a Crown station operated by Crown itself, a Texaco station operated by a 'jobber,' and a convenience store that leases its premises to a Citgo. Yet under S.B. 235 only the Mobil station is covered.

Pet. App. B37-B38. The district court thus concluded that refiners such as Mobil that leased their stations to franchised dealers had been arbitrarily separated from other competitors in an invalid attempt to further private interests.

The court of appeals affirmed the district court's PMPA preemption decision with the exception of its hold-

ing that the "rent control" provision was valid under the PMPA. The Fourth Circuit noted that Congress "used very broad language to define the PMPA's preemptive scope" by using the terms "with respect to termination." Pet. App. A11. The court of appeals accordingly found that the "plain language of the statute" required it to hold that S.B. 235, including the rent control provision, was preempted. As the court of appeals stated its holding: "Unless the terms prohibited by S.B. 235 would in all circumstances be unreasonable and immaterial—a finding we are unwilling to make—S.B. 235 eliminates grounds for termination that would be available under the PMPA" and provides franchisees with a remedy for termination that is thus not "the same as" those set forth in the PMPA. Pet. App. A10. The court's analysis was consistent with that of every other court of appeals to address the issue. Chief Judge Ervin dissented, arguing that the PMPA leaves the States free to regulate the "substance" of the franchise relationship, that S.B. 235 did not affect the procedural aspects of termination that are preempted by the PMPA, and that the majority's ruling threatens to leave States powerless to regulate petroleum franchises.

On petitions for rehearing and rehearing in banc, no judge of the court of appeals requested a poll of the judges. The petitions were accordingly denied. Following denial of rehearing, the Attorney General of Virginia determined not to seek certiorari. VGMARA is thus the sole petitioner here.

REASONS FOR DENYING THE PETITION

The court of appeals' opinion represents a straightforward application of express statutory preemption language to the operation of a particular state statute. The Fourth Circuit employed the same analysis used by every single court of appeals to address PMPA preemption. Nothing about this decision merits plenary review. The briefs of VGMARA and *Amici* claim that review is warranted on the basis of alleged differences of opinion among lower courts on PMPA issues, but none of these issues is presented in this case. The court of appeals' decision faithfully followed the statutory language and congressional intent embodied in the PMPA, and the decision recognizes the appropriate role of the States in regulation of franchise relationships. Contrary to the incorrect statements of VGMARA and *Amici*, Mobil does not take the position that all state laws potentially applicable to petroleum franchises are preempted, and this was not the holding of the court of appeals. Finally, the decision below was also fully supported by an alternative state law ground of decision not addressed by the court of appeals, providing a further reason that this is an inappropriate case for certiorari review.

I. THE FOURTH CIRCUIT'S APPROACH TO PMPA PREEMPTION IS ACCEPTED BY EVERY CIRCUIT THAT HAS ADDRESSED THE ISSUE

VGMARA asserts in its introduction that this petition involves a recurring conflict among the circuits on the issue of PMPA preemption. Pet. 6. Yet the body of the petition studiously avoids comparing the actual holding of the Fourth Circuit here with the decision of any other court of appeals. Instead, the most VGMARA is willing to say is that Mobil relied upon a Sixth Circuit decision, *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986), and that *Consumers* conflicts with decisions from other courts of appeals and district courts, including *Esso Standard Oil Co. v. Department of Con-*

sumer Affairs, 793 F.2d 431, 434 (1st Cir. 1986) and *O'Shea v. Amoco Oil Co.*, 886 F.2d 584 (3d Cir. 1989). *See* Pet. 20-23. VGMARA's attempt to avoid addressing the opinion below is telling, because the Fourth Circuit's analysis here was the same analysis expressly approved in *Consumers, Esso Standard*, and *O'Shea*. Indeed, *no* other court of appeals has ever applied a standard for PMPA preemption narrower than the one the Fourth Circuit applied in this case.

VGMARA's reliance upon *Esso Standard* serves to highlight the absence of any basis for certiorari. The First Circuit's opinion was a key authority cited by the Fourth Circuit in *support* of its decision. Mobil has argued from the start of this litigation that the PMPA preempts state petroleum franchise laws that impose penalties on, and permit franchisees to challenge, terminations permitted by the PMPA. VGMARA concedes that S.B. 235 does this. They fail to mention that the statute at issue in *Esso Standard* did not. In that case, the First Circuit upheld a statute that provided for a state authority to set rents, but specifically *allowed* the franchisor to terminate the franchise if it were uphappy with the rent actually set. The court's reasoning explicitly and directly supports the Fourth Circuit's opinion here:

> The preemption provision of the PMPA would clearly invalidate any DOCA regulation that set rental rates for a franchise *and then* did not allow a franchisor to terminate or not renew a franchise if it did not wish to accept that established rate. That is, *any law that gave a franchisee a cause of action to contest a termination of a franchise, when that termination would otherwise be valid under the PMPA, would be preempted by the PMPA.*

Id. at 434 (emphasis added). The challenged provisions of S.B. 235 do exactly what the *Esso Standard* court said a state or local regulation cannot do and still survive preemption.

The Third Circuit in *O'Shea*, like the First Circuit in *Esso Standard*, found that a state law claim (for fraud in the inducement of a contract) was not preempted by the PMPA because it did not alter the franchisor's rights to termination under the PMPA. Like *Esso Standard*, the *O'Shea* opinion again explicitly applied the same approach to preemption applied by the panel here. As a means of illustrating why the opinion below poses no conflict with *O'Shea*, Mobil cannot hope to improve upon VGMARA's quotation from *O'Shea* at page 24 of its petition:

> And, with respect to the grounds for termination, we believe that PMPA only preempts state laws that *limit the permissible substantive reasons* that a petroleum franchisor can terminate a franchisee.

886 F.2d at 592 (emphasis added). At the risk of excess repetition: appellants concede, as the Fourth Circuit held in *Mobil I*, that S.B. 235 *does* "limit the permissible substantive reasons that a petroleum franchisor can terminate a franchisee." The *O'Shea* analysis mandates its preemption.[4]

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[4] VGMARA additionally argues that the opinion below conflicts with three district court decisions. While conflicting district court authority would provide no basis for a grant of certiorari, the cases are not in conflict. In *Lasko v. Consumers Petroleum of Connecticut, Inc.*, 547 F. Supp. 211, 217 (D. Conn. 1981), there was no contention that the Connecticut statute at issue prohibited terminations and nonrenewals otherwise permitted by the PMPA. Here, that is exactly the position consistently taken by VGMARA. In *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F. Supp. 1008, 1018 (N.D. Ga. 1979), *aff'd*, 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932 (1981), the district court "agree[d] that [the] existence of the PMPA forbids a suit by a Georgia dealer claiming he was terminated because he refused to agree to terms forbidden by the Georgia Act . . . ." The district court declined to find preemption, however, based upon its (incorrect) prediction back in 1979 that suits by terminated franchisees were merely a "slight, unlikely possibility." *Id.* The intervening fifteen years of PMPA franchise litigation makes clear that it was based on a false premise and no longer has even any persuasive force. Finally, *Civitella v. Shell Oil Co.*, 656 F. Supp. 144 (D. Ariz. 1986), which allowed general

VGMARA also cites *Pride v. Exxon Corp.*, 911 F.2d 251 (9th Cir. 1990) as conflicting authority. Pet. 25. Again, however, *Pride* rejected a preemption claim on grounds that the state law claim at issue *did not* affect the rights of a franchisor to terminate under the PMPA. Like *Esso Standard* and *O'Shea*, the *Pride* opinion specifically acknowledged that provisions like S.B. 235 fall in a different category. 911 F.2d at 258 ("Pride's fraud claim is not founded upon state law that would have the effect of limiting the permissible statutory reasons that a petroleum franchisor can terminate a franchisee."). *Pride* allowed a state law claim for misrepresentation in the formation of a contract, holding that nothing in the PMPA prevents a franchisor from simply being held to its promises under the *general* state common law of contracts. *Id.* at 257-58. *Pride* is entirely consistent with the court of appeals' opinion here, which deals not with generally applicable statutory or common law, but with a statute that specifically gives petroleum franchisees a cause of action to contest terminations and nonrenewals permitted by the PMPA.[5]

The Fourth Circuit's approach to preemption here is in accord not only with that of the First Circuit in *Esso Standard* and the Third Circuit in *O'Shea*, but also with that of the Second, Sixth, Eighth, and Ninth Circuits. Perhaps most instructive are the Second Circuit's opinions in *Darling v. Mobil Oil Corp.*, 864 F.2d 981 (2d Cir. 1989) and *Mobil Oil Corp. v. Karbowski*, 879 F.2d 1052

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state common law claims of fraud and misrepresentation, poses no conflict here for the same reasons applicable to the *Pride* decision discussed above.

[5] For the same reasons discussed above with respect to *O'Shea* and *Pride*, VGMARA's citation (disfavored under 10th Cir. R. 36.3) to the unpublished opinion in *Filiaga v. Chevron, U.S.A., Inc.*, No. 89-4098 (10th Cir. 1990), provides no basis for review. *Filiaga* addressed a general common law claim of equitable estoppel in the context of a motor fuel franchise, and did not involve a state statute with respect to grounds for termination such as S.B. 235.

(2d Cir. 1989), *aff'ing*, 667 F. Supp. 927 (D. Conn. 1987). In those cases, the Second Circuit held that the PMPA preempted Connecticut provisions preventing termination or nonrenewal for failure to meet sales quotas or operate 24 hours. As with the statutes in the Second Circuit cases, S.B. 235 is preempted because "[t]he state law effectively prejudges what is an unreasonable and immaterial provision in a franchise agreement so as to preclude a termination or nonrenewal based on the franchisee's failure to comply with such a provision." 667 F. Supp. at 935.[6] The best treatment VGMARA can muster for *Darling* is to say that it is "at odds" with VGMARA's preferred construction of the PMPA. Pet. 22.

The Ninth Circuit has recently used the same analysis as the Fourth Circuit in finding that a state law challenge to the rental structure of a petroleum franchise agreement is preempted by the PMPA. *See Simmons v. Mobil Oil Corp.*, 29 F.3d 505 (9th Cir. 1994). The Ninth Circuit held that the franchisee's proper remedy for complaints about rent levels is to refuse to sign the agreement and bring an action under the standards of the PMPA: "State law imposes a different standard of behavior, and therefore state law claims are preempted by 15 U.S.C. § 2806." *Id.* at 512. As in *O'Shea*, the court found that only state common law claims that did not "implicate Mobil's termination or nonrenewal of the franchise" survived PMPA preemption. The Ninth Circuit stressed the PMPA's strong preemptive force:

> We have held that section 2806(a) "provides for preemption of *all* state law inconsistent with the PMPA. The language in section 2806(a) makes

[6] In *Darling*, the Second Circuit carefully discussed and *rejected* the approach to the PMPA advanced by appellants here. Instead, the Second Circuit held that state law proscription of a ground for termination that *could be* considered "reasonable and material" under the PMPA creates "a direct conflict between federal and state law." 864 F.2d at 987.

> clear the PMPA *was intended to preempt all state law* with respect to termination of a petroleum franchise." *In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986); *accord, Humboldt Oil Co. v. Exxon Co., U.S.A.*, 823 F.2d 373, 374-75 (9th Cir. 1987) (per curiam) (California law on assignment is preempted by the PMPA, whose purpose is to provide a "national, uniform policy for petroleum franchise termination"), *cert. denied*, 485 U.S. 1021 (1988).

Id. at 511 (emphasis in original).

Finally, the Sixth and Eighth Circuits have taken a view of PMPA preemption that is at least as expansive as the court of appeals' opinion on the facts presented here. In *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986), the case about which VGMARA complains most bitterly, *see* Pet. 10-13, the Sixth Circuit held that the PMPA preempts even common law claims of fraud and misrepresentation. What VGMARA fails to mention is that no such common law claims are involved here. VGMARA's complaints about the *Consumers* preemption analysis thus have no relevance to this petition. Similarly, the Eighth Circuit in *Continental Enterprises, Inc. v. American Oil Co.*, 808 F.2d 24, 28 (8th Cir. 1986), held that the PMPA preempts state law claims for tortious interference with contract, breach of contract, and misrepresentation arising out of a franchise termination. Of course, these decisions regarding preemption of state common law claims *support* the Fourth Circuit's narrower analysis here, which invalidated state statutory provisions explicitly aimed at restricting permissible grounds of termination in petroleum franchises. To the extent their holdings involve broader questions of PMPA preemption, those questions are not presented here.

The list of alleged "conflicts" set forth by *Amici*, *see* Amici Br. 11-12, further demonstrates that, to the extent there is any conflict of authority under the PMPA, it is not one presented here. In addition to arguments already

addressed above, *Amici* say that there is a conflict involving PMPA coverage of "ancillary franchises." *Id.* at 12. But there is no ancillary franchise involved in this case. Even more egregious, *Amici* contend the Court should grant review because of a circuit conflict over state "goodwill statutes." Amici Br. 11-12. In addition to the fact that goodwill statutes are not involved in this case, *Amici* fail to inform the court that the recent PMPA amendments specifically invalidate goodwill provisions, removing any conflict that might have existed in the past. *See* P.L. 103-371, at § 5, 108 Stat. 3484, 3485 (1994). In short, the circuits have taken a remarkably consistent approach to PMPA preemption, and the invalidation of the challenged provisions of S.B. 235 below is squarely within the uniform core of the analysis in every circuit. There is no conflict here.

II. THE FOURTH CIRCUIT'S OPINION CORRECTLY REFLECTS CONGRESSIONAL INTENT AND PROVIDES APPROPRIATE SCOPE FOR VALID STATE REGULATION

Because the circuits so uniformly accept the principle that state law cannot prohibit grounds of termination in petroleum franchises that are allowed by the PMPA, appellants have mischaracterized the court of appeals' opinion and Mobil's position. They thus assert that the panel opinion precludes *all* state law involvement in anything connected with petroleum franchises and mandates total preemption of all state law affecting them. Pet. 7, 28. This is then said to conflict with the PMPA's "primary purpose" of protecting franchisees, which VGMARA contends must override every other consideration in PMPA cases. Neither the court of appeals' opinion nor Congress' expressed intent in passing the PMPA supports these contentions.

VGMARA appears to believe that this entire case (and every PMPA case) can be resolved with the simple statement that "the primary objective and purpose of the

PMPA was protection of franchisees." *E.g.*, Pet. 10. Putting aside VGMARA's pages of rhetoric, this argument boils down to an assertion that in PMPA cases the franchisee must always win. This is nothing more than law office history. In addition to the plain language of the statute's text, on which the Fourth Circuit based its opinion, the legislative history indicates that *uniformity* of federal law and protection of *flexibility* for franchisors are important goals of the PMPA:

> just as remedying the disparity in bargaining power between franchisors and franchisees provides a need for this legislation, federal legislation is also needed in order to establish uniform guidelines regarding the franchise relationship.

S. Rep. No. 731, 95th Cong., 2d Sess. 19-20, *reprinted in* 1978 U.S.C.C.A.N. 873, 877. In short, as the court of appeals recognized, every piece of legislation reflects a balance between *competing* objectives, and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." Pet. App. A11, *citing Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original).

VGMARA premises its petition on the incorrect assertion that the court of appeals' opinion mandates preemption of *all* state laws to the extent they apply to motor fuel franchises. But, as described above, the Fourth Circuit made no such holding. Questions concerning the outer limits of PMPA preemption are not presented in this case and need not be addressed until they arise. For example, the Third Circuit in *O'Shea* found that the PMPA did not preempt the generally applicable state law of fraud in the inducement of a contract. The Sixth Circuit in *Consumers Petroleum* and the Eighth Circuit in *Continental Enterprises* have taken a broader view of PMPA preemption and have found common law claims of fraud and misrepresentation preempted. *See supra* at 13. No such questions are before the Court here. In

contrast, the panel addressed a paradigm case for preemption—a statute exclusively applicable to petroleum franchises that specifically prohibits terminations and nonrenewals on grounds permitted by the PMPA. *See* n.2, *supra*.

Amici cite this Court's opinion in *CTS Corporation v. Dynamic Corporation of America*, 481 U.S. 69 (1987) for the proposition that preemption should not be found in areas of longstanding regulation unless Congress has said so explicitly. Amici Br. 3-5. But *Amici* ignore the fact that the statute at issue in *CTS* (the Williams Act), unlike the PMPA, *did not* even contain an express preemption provision. This is a statutory express preemption case, and VGMARA's and *Amici*'s arguments about implied preemption are totally off point. Moreover, this Court in *CTS* found that the state statute at issue *furthered* the aims of the federal statute. *See* 481 U.S. at 81-83. That is hardly the case here, where *Amici*'s position would result in a return to the "uneven patchwork" of state franchise regulation that the PMPA sought to correct, undermining the PMPA's goal of uniformity.

There is simply no basis for VGMARA's contention that franchisees lack protection in view of the franchisee safeguards in the PMPA, including its proscription of "unreasonable" actions by refiners. *See, e.g.*, 15 U.S.C. § 2802(b)(2)(A). The Fourth Circuit's opinion, moreover, leaves ample room for state laws that do not affect the grounds for termination that are otherwise available under the PMPA. An example of this is the statute at issue in *Esso Standard*, which expressly allowed the franchisor to terminate the franchise rather than submit to state-mandated rental levels. The Third Circuit's view of preemption with respect to state law misrepresentation claims in *O'Shea* likewise is an example of state law that the PMPA leaves in place. Other examples can be found in the Virginia Petroleum Products Franchise Act itself, such as Va. Code § 59.1-21.15, requiring certain disclosures by the refiner before the execution of a franchise

agreement. Disclosure provisions have no relation to termination, and they are not preempted. In short, to the extent they are not "with respect to termination," state franchise regulations are undisturbed by the PMPA.

Presenting an argument never made in the courts below, *Amici* contend that the introductory phrase "to the extent any provision of this subchapter applies to the termination . . . of any franchise" indicates that PMPA preemption is narrow.[7] *Amici* argue that because the provisions of S.B. 235 do not contradict any specific provision of the PMPA that "applies to termination," they are not preempted. But *Amici* are able to make this argument only by omitting from their description of the grounds for preemption set forth in the PMPA, *see* Amici Br. 7-8, any mention of the PMPA's authorization for franchisors to terminate for reasons of

- "failure by the franchisee to comply with any provision of the franchise, which provision is both *reasonable* and of *material significance* to the franchise relationship," 15 U.S.C. § 2802(b)(2)(A) (emphasis added);
- "failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise," 15 U.S.C. § 2802(b)(2)(B); or
- "occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable." 15 U.S.C. § 2802(b)(2)(C).

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[7] *Amici*'s half-hearted Tenth Amendment argument, Amici Br. 9, also was not advanced below, and is not properly before the Court. In any event, *Amici* cite no case supporting the proposition that PMPA preemption as applied here implicates the Tenth Amendment, and there is no such case. While Mobil respects the principles of federalism embodied in the Tenth Amendment, they are not implicated here. The inclusion of this desperate argument provides the Court a strong signal with respect to all of *Amici*'s arguments, not unlike the thirteenth chime of a clock.

Each of the contested provisions of S.B. 235 forbids terminations on grounds upon which franchisors are entitled to terminate under these provisions of the PMPA. *See supra* at 5 & n.2.

The problem with *Amici*'s position is illustrated by its application to one of the grounds for termination at issue here—failure to meet fuel sales quota. Under the PMPA, courts determine on a case by case basis whether particular sales quotas are "reasonable and material" on a given set of facts. *See, e.g.*, S. Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S.C.C.A.N. 873, 901 (PMPA requires resolution of disputes on a "case-by-case basis"). *Amici* would instead allow States to eliminate this federal statutory scheme by allowing state law to determine on a statewide basis—without the case by case review mandated by federal law in the PMPA—that *all* fuel quotas are unreasonable no matter what the facts. The contention is that, despite explicit language to the contrary in § 2806, any state law relating to the "substance" of the franchise relationship should override the termination provisions of the PMPA, even though such state laws eliminate grounds for termination and nonrenewal currently available under the PMPA. In essence, *Amici* argue that the state law remedial scheme should preempt federal law. This is exactly backwards.

The Court has unanimously rejected the type of statutory analysis advocated by *Amici* here. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990) (States may not "withdraw federal remedies by establishing state remedies as exclusive" and state attempts to do so "cannot be viewed as permissible interstitial regulation in the service of, or at least neutral with respect to, the purposes of the federal scheme"). The PMPA grants some rights to franchisees (to further the purpose of franchisee protection) and some rights to franchisors (to further the purposes of national uniformity in the law and franchisor flexibility). The PMPA grants franchisors a right to

terminate franchises under certain conditions. States may no more deprive franchisors of these rights to terminate than they may deprive franchisees of their protections under the federal law.

VGMARA has argued at great length below that unless its interpretation of 15 U.S.C. § 2806(a) is accepted, refiners will be free to demand that franchisees employ topless service station attendants, serve beer after midnight, and sell cigarettes to minors. It is *not* Mobil's position that general laws of this type are preempted. Moreover, this brand of anti-preemption hyperbole has already been rejected by this Court. In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), a preemption case strikingly similar to this one, the Court found state advertising and consumer protection statutes preempted by the Airline Deregulation Act's express preemption of any state law "relating to" rates, routes, or services of an air carrier. Like the Fourth Circuit here, the Court looked to the express language of the statute, and was unpersuaded by the Texas Attorney General's contention that preemption would allow airlines to engage in gambling and prostitution. *See* 112 S. Ct. at 2040 (aptly noting that such extreme examples could be addressed in the unlikely event they arose, and that "the present litigation plainly does not present a borderline question").

VGMARA would like to pretend that there is no difference between laws of general application and statutes like S.B. 235 that specifically target petroleum franchise terminations. This Court, however, has indicated in the contexts of airline deregulation and cigarette labeling legislation how this distinction can apply. *See American Airlines, Inc. v. Wolens*, No. 93-1286 (U.S. January 18, 1995) (holding application of state statutory "consumer fraud" regulation to airlines preempted under express preemption provision of Airline Deregulation Act but allowing claims under State's general common law of contract); *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2624 (1992) (finding state law claims predicated on a "duty

'based on smoking and health' " preempted while claims based "on a more general obligation—the duty not to deceive" survive preemption). Likewise in *O'Shea*, the court of appeals noted in upholding a state common law contract claim that the "goal of the framers of the PMPA was to create a uniform system of franchise termination, not a uniform system of contract law." 886 F.2d at 593. But such broad questions are not presented here. The court of appeals, like every other circuit, has correctly concluded that state provisions directly aimed at petroleum franchises that prohibit grounds for termination permissible under the PMPA are preempted by federal law.

III. THE UNADDRESSED VIRGINIA LAW GROUND FOR DECISION BELOW COUNSELS AGAINST REVIEW

The distinction between laws of general applicability and narrow special interest legislation provides an additional reason why the Court should not devote its resources to review of this case. In addition to PMPA preemption, the district court found that S.B. 235 was invalid because it is a "special law" in violation of the Virginia Constitution. Pet. App. B32-B39. This Virginia doctrine prohibits enactment of special interest economic favoritism such as S.B. 235 that arbitrarily treats one class of persons differently from another. Applying Virginia's special laws doctrine, the district court noted that S.B. 235 admittedly "targets less than 20 percent of Virginia's 5,278 retail outlets for the sale of motor fuel," just as the Sunday closing statute in *Benderson Development Co. v. Sciortino*, 236 Va. 136, 372 S.E.2d 751 (1988), covered less than 20 percent of the employed persons in Virginia. Pet. App. B38. The district court noted that the beneficiaries of S.B. 235 are "a discrete group of franchisees represented by VGMARA," most of whom "average incomes of more than $100,000 annually," *id.*, and concluded that S.B. 235 is a classic example of the type

of special interest legislation prohibited by the special laws doctrine.

Regardless of the disposition of Mobil's PMPA claim, neither VGMARA nor anyone else has advanced an explanation of why the Virginia district judge's thorough analysis of Virginia law on this point is in any way lacking. Thus, review of the federal PMPA issue would have no effect on the ultimate outcome of the case. In this circumstance, plenary review would hardly be a wise discretionary use of this Court's time and resources, even if certiorari were otherwise appropriate under the Court's established standards. *See generally* R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* 173 (7th Ed. 1993).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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January 23, 1995